LIBRARY
SUPREME COURT, U. S.

FILED
MAY 25, 1959
JAMES R. BROWNING, Clerk

In The
Supreme Court of the United States

October Term, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

VERSUS

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and
LOUIE J. SPEED, INC.,
Appellees.

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

BRIEF OF ATTORNEY GENERAL OF OKLAHOMA AS *AMICUS CURIAE*

MAC Q. WILLIAMSON
Attorney General of Oklahoma
State Capitol Building
Oklahoma City 5, Okla.

MAY, 1959.

KING LAW BRIEF CO., COMMERCE EXCHANGE BLDG., OKLAHOMA CITY—PHONE FO 5-2969

INDEX

	PAGE
Motion for leave to submit a brief amicus curiae	1
Statement of Amicus Curiae	5
Statement of the Case	6
Summary of Argument	7
Argument:	
Point I	8
Point II	16
Conclusion	19
Certificate of Service	19

INDEX TO AUTHORITIES

CASES

Adwon v. Oklahoma Retail Grocers Association, Inc., 204 Okl. 199, 228 P. 2d 376 (1951)	10
Associated Merchants of Montana et al. v. Harry L. H. Ormesher and Bernard Blodgett, 107 Mont. 530, 86 P. 2d 1031 (1939)	9
Carroll v. Schwartz, 127 Conn. 126, 14 A. 2d 754 (1940)	9
Commonwealth of Pennsylvania v. B. P. Zasloff, 338 Pa. 457, 13 A. 2d 67 (1940)	10
Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911)	6
Englebrecht v. Day, 201 Okl. 585, 208 P. 2d 538 (1949)	10
Fournier v. Troianello, 636 Mass. 232, 127 N. E. 2d 167 (1955)	9

	PAGE
Fox Films Corp. v. Muller, 296 U. S. 207 (1935)	14
Great Atlantic & Pacific Tea Co. v. Ervin, D. C. Minn., 23 F. Supp. 70 (1938)	10
Hill et al. v. Kusy, 150 Neb. 653, 35 N. W. 2d 594 (1949)	10
Honeyman v. Hanan, 300 U. S. 14 (1936)	14
Isaac Cohen et al. v. Frey and Sons, Inc. et al., 197 Md. 586, 80 A. 2d 267 (1951)	10
Louisiana Wholesale Distributors Association, Inc. v. Rosenzweig, 212 La. 1015, 36 S. 2d 403 (1948)	9
Lynch v. New York ex rel. Pierson, 293 U. S. 52 (1934)	15
Moore v. Northern Kentucky Independent Food Dealers Association et al., 286 Ky. 24, 149 S. W. 2d 755 (1941)	9
McCoy v. Shaw, 277 U. S. 302 (1928)	15
McElhone v. Geror, 207 Minn. 580, 292 N. W. 414 (1940)	10
McIntyre v. Borofsky, 95 N. H. 174, 59 A. 2d 471 (1948)	9
Nebbia v. New York, 291 U. S. 502 (1934)	12
New York City v. Central Savings Bank, 306 U. S. 661 (1958)	14
People v. Pay Less Drug Store, 25 Cal. 2d 108, 153 P. 2d 9 (1944)	16
People of the State of California v. Gordon, 105 Cal. App. 2d 711, 234 P. 2d 287 (1951)	9
Rust et al. v. Griggs, 172 Tenn. 565, 113 S. W. 2d 733 (1938)	9
Smiley v. Kansas, 196 U. S. 447 (1905)	14
Sproles v. Binford, 286 U. S. 374 (1932)	12, 17, 18

PAGE

Standard Oil Co. v. Trade Commission, 340 U. S. 231 (1951) 11

Standard Stores v. Safeway Stores, Inc. et al., Colo. Dist. Ct. 1955 C. C. H. Trade Cases, para. 68,153 (1955) 10

State of Arizona v. A. Meyerson et al., Sup. Ct. of Ariz., Pima County, 1940-1941 C. C. H. Trade Cases, para. 56,099 (1941) 10

State of Arizona v. Walgreen Drug Co., 57 Ariz. 308, 113 P. 650 (1941) 10

State of Kansas v. Consumer's Warehouse Market, Inc., Kan. Sup. Ct., 329 P. 2d 638 (1958) 10

State v. Langley, 53 Wyo. 332, 84 P. 2d 767 (1938) 10

State of New Jersey, on Complaint of Lief v. Packard-Bamberger and Co., Inc., 123 N. J. L. 180, 8 A. 2d 291 (1939), affirming N. J. Dist. Ct., 2 A. 2d 599 (1938) 10

State of Washington v. Sears, 4 Wash. 2d 200, 103 P. 2d 337 (1940) 9

State of Wisconsin v. Ross, Wis. Sup. Ct., 1950-1951 C. C. H. Trade Cases, para. 62,860 (1951) 9

State of Wisconsin v. Twentieth Century Market, 236 Wis. 215, 294 N. W. 873 (1940) 9

Wiley, d. b. a. Fairmount Market v. Sampson-Ripley Co., 151 Me. 400, 120 A 2d 289 (1956) 10

Maine Revised Statutes, Ninth Revision, 1954, Chapter 184 8

Maryland Code, 1951, Annotated, Article 83, Sections 111-115 8

Massachusetts General Laws, 1932, Chapter 93, Sections 14e-14K (inserted by Act of 1938, Chapter 410). Amended by Act of 1939, Chapter 189; Act of 1941, Chapter 494 8

PAGE

Minnesota Statutes, 1953, Chapter 325, Sections 325.01-325.07, 325.48, 325.49, 325.52. Amended, Laws of 1955, Chapter 339, Laws of 1957, Chapter 822 ..... 8, 10

Montana Revised Code, 1947, Title 51, Chapter 1. Amended Montana Laws, 1949, Chapter 129 8

Nebraska Revised Statutes, 1943, Chapter 59, Article 12. Amended Laws, 1947, Chapter 203 ..... 9, 10

New Hampshire Revised Statutes, Annotated, 1955, Chapter 358 9

New Jersey Laws, 1938, Chapter 394 (New Jersey Revised Statutes, Title 56, Chapter 4) 9

North Dakota Revised Code, 1943, Chapter 51-10 9

Oklahoma Unfair Sales Act (Oklahoma Statutes 1951, Title 15, Chapter 14, Sections 598.1-598.11 9

Oregon Revised Statutes, Title 50, Chapter 646, Sections 646.020, 646.100 to 646.180, 646.990 9

Pennsylvania Laws, 1941, Act. No. 344 ..... 9, 10

Rhode Island Public Laws, 1939, Chapter 671 9

South Carolina Civil Code of 1912, Section 2451 (1902, XXIII, 1057) 9, 10

South Carolina, South Carolina Code of Laws, 1952, Title 56, Chapter 2, Article 3 9

Tennessee Code Annotated, 1955, Title 69, Chapter 3 9

Utah Code, 1953, Title 13, Chapter 5, Amended Senate Bill 92, Laws of 1955 9

Virginia Code, 1950, Title 59, Chapter 2; Amended, Acts of Assembly, 1950, Chapter 588 9

Washington Revised Code, 1951, Title 19, Chapter 19.88, Sections 19.88.040-19.88.170 9

Williams v. Mayor, 289 U. S. 36 (1933) 11

PAGE

Williamson v. Lee Optical Co., 348 U. S. 483 (1955) 17

Yazoo and Mississippi Valley Railroad v. Jackson Vinegar Co., 226 U. S. 217 (1912) 13

UNITED STATES CONSTITUTION

The Fourteenth Amendment 17

UNITED STATES STATUTES

Robinson-Patman Act, 15 U. S. Code 13a et seq. 11

STATE STATUTES

Arizona Revised Statutes, 1955, Volume 5, Title 44, Chapter 10, Article 4, Sections 44-1466 8

Arkansas Statutes, 1947, Volume 6, Title 70, Chapter 3 8

California Laws, 1941, Chapter 526 (California Business and Professions Code, Division 7, Part 2, Chapter 4). Amended California Laws of 1953, Chapters 333-334 8

Colorado Revised Statutes, 1953, Volume 3, Chapter 55, Article 2, Sections 55-2-1 to 55-2-17 8

Connecticut General Statutes, Revision of 1949, Title 48, Chapter 314, as amended by Public Act. No. 544, Acts of 1955 8

Hawaii Revised Laws, 1955, Title 24, Chapter 205 8

Idaho Code, 1947, Title 48, Chapter 4. Amended by Laws of 1955, Chapter 95, Chapter 234; Laws of 1959, House Bill No. 281 8

Kansas General Statutes, 1949, Annotated, Chapter 50, Article 4 8

Kentucky Revised Statutes, 1956, Sections 365.030, 365.040, 365.060, 365.070, 365.990 8

PAGE

Louisiana Revised Statutes, 1950, Title 51, Part VIII, Sub-Part E. Amended, Act. of 1952, Act. 181; Acts of 1956, Act 121 8

West Virginia Acts of 1939, Chapter 151, West Virginia Code, Sections 4678 (8) (a) - (n) 9

Wisconsin Statutes, 1955, Title XII, Chapter 100, Section 100.30; Amended Chapter 186, Laws of 1957 9

Wyoming Compiled Statutes, 1945, Article 4, Sections 39.406-39.416 9

MISCELLANEOUS

Brandeis, Business—A Profession (1914) 6

Hart & Wechsler, The Federal Courts and the Federal System (1953) 13

Lovell, Sales Below Cost Prohibitions, 57 Yale L. J. 391 (1948) 11

Note, 86 U of Pa. L. Rev. 780 (1938) 12

Note, 22 Wash. U. L. Q. 549 (1937) 6

Opinion of Attorney General of Oklahoma, May 8, 1950 18

Seligman and Love, Price Cutting and Price Maintenance (1932) 6

Weigel, The Fair Trade Acts 82 (1938) 6

In The
Supreme Court of the United States

October Term, 1958

No. 252

SAFEWAY STORES, INCORPORATED,

Appellant,

VERSUS

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and LOUIE J. SPEED, INC.,

Appellees.

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICUS CURIAE*

The undersigned, as Attorney General of the State of Oklahoma, respectfully moves this Court for leave to file the accompanying brief, as *Amicus Curiae;* and realizing the "eleventh-hour" nature of this filing, would show to the Court as follows:

This case brings in issue the constitutionality of what is deemed to be a most important Oklahoma Statute,

namely "The Oklahoma Unfair Sales Act" (Okla. Statutes 1951, Title 15, Chap. 14, Sec. 598.1-598.11). The opinion below is reported in 322 P. 2d p. 179 (Okl., 1957).

Bearing in mind Paragraph 4 of Rule 42, I desire to state that only quite recently the Oklahoma Retail Grocers Association, Inc., have directed the attention of the Governor of Oklahoma (and the undersigned) to the pendency of this litigation; and further, to note the receipt—by the undersigned—from the Governor of Oklahoma (on May 15, 1959) of the following official communication:

(SEAL)

"STATE OF OKLAHOMA
EXECUTIVE CHAMBERS
OKLAHOMA CITY

J. Howard Edmondson
Governor

May 13, 1959

Honorable Mac Q. Williamson
Attorney General
Building

Re: Safeway Stores, Incorporated
Appellant,
v.
Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc.,
Appellees.

Dear General Williamson:

"This office is informed that the above styled case has been appealed to the Supreme Court of the United States and has been designated as Case No. 252.

"We are further informed that this case is a direct attack upon the constitutionality of the Oklahoma Unfair Sales Act, therefore, raising a question of substantial interest to the State of Oklahoma.

"You are, therefore, requested and directed to make an examination of this case and to file such briefs and enter such appearances as you may deem proper.

Sincerely,

s/ J. HOWARD EDMONDSON
GOVERNOR"

JHE/sps

And for the further information of the Court I may state that a short time prior to the receipt of this letter from the Governor, the Executive Secretary-Manager of the State Retail Grocers Association, together with their chief counsel, discussed the pendency of this litigation with both the Governor's office and with the undersigned.

Before that time (and being concerned and occupied with our duties relative to a current regular session of the State Legislature) neither the Governor's office nor the undersigned had been consulted regarding the filing herein of a brief *Amicus Curiae*.

Acting upon authority hereinabove set forth, and in support of our "Motion" herein, I would state to the Court that under the provisions of the Oklahoma Statute in question, the retail business and industry of this State has enjoyed—because of the terms of this Act—a period of orderly progress in retail merchandising, free from use

of "loss leader" or "cut throat" type of merchandising competition; and that most—if not all—of the thousands of Oklahoma retail grocers—and other retailers—are interested in this litigation.

Wherefore, it is respectfully urged that the accompanying brief—service being had by mail upon all counsel of all parties of record—be permitted filing and consideration, herein.

Dated May 18, 1959

Respectfully submitted,

MAC Q. WILLIAMSON
State of Oklahoma ex rel. Mac Q. Williamson, Attorney General of Oklahoma
State Capitol Building
Oklahoma City 5, Oklahoma.

In The
Supreme Court of the United States

October Term, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

VERSUS

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and LOUIE J. SPEED, INC.,
Appellees.

BRIEF OF ATTORNEY GENERAL OF OKLAHOMA AS *AMICUS CURIAE*

STATEMENT OF *AMICUS CURIAE*

The Attorney General of Oklahoma appears as *amicus curiae* in this case (Rule 42 [Subd. 4]) to support the constitutionality of the Oklahoma Unfair Sales Act (Oklahoma Statutes 1951, Title 15, Chapter 14, Sections 598.1-

598.11). The opinion below is reported at 322 P. 2d 179 (Okl., 1957).

STATEMENT OF THE CASE

Safeway was charged with numerous instances of selling "loss leaders"[1] at prices below cost in violation of the Oklahoma Unfair Sales Act in five different cities in Oklahoma[2]. It sought to justify its conduct by claiming:

(1) that in Tulsa, Enid, Shawnee and Norman, its sales were made to meet the equally low prices of its competitors who were also selling below cost; and,

(2) that in Oklahoma City it was "meeting" the prices of its competitors who were selling at the statutory minimum and giving trading stamps as well (R. 51-56).

Safeway paid no heed to whether the prices it claimed to be meeting were legal or illegal.

Q. "All right; now what was your policy,—was it your policy to meet any price of a competitor, regardless of whether it was legal or illegal?

1. "The loss leader system is a business scheme whereby a widely advertised product of standard quality and popular demand is sold at little or no profit as an inducement to the customer to enter the store." Note, 22 Wash. U. L. Q. 549 (1937) For Brandeis the inducement was a *false* inducement, the loss leader a "'mis-leader,' because ordinarily the very purpose of the cut-price is to create a false impression (of general economies) • • •" Brandeis, *Preventing Standardized Prices,* quoted in Weigel, *The Fair Trade Acts,* 82 (1938). Brandeis feared the use of such devices would eliminate the small entrepreneur. Brandeis, *Business—A Profession* (1914). See also Seligman and Love, *Price Cutting and Price Maintenance,* 143-162 (1932), emphasizing the effect of interdependent prices on loss leader selling. Holmes also opposed loss leadering, saying: "I cannot believe that in the long run the public will profit by this Court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get." *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373 (1911), dissenting opinion at 412.

2. Oklahoma City, Tulsa, Enid, Shawnee and Norman.

A. It was our policy to meet the price.

Q. Regardless, is that right?

A. Regardless, yes, sir" (R. 239).

This "policy" of indiscriminate retaliation the Oklahoma Supreme Court rejected as procedurally not in keeping with the clear dictates of the Act; saying:

> "We are of the opinion that this injunction granted by the trial court against Safeway was proper, because under our Statute the appropriate remedy was by injunction and not by retaliation or retaliatory action, such as was practiced by Safeway. In this respect the judgment of the trial court is affirmed" (R. 637).

The State court also affirmed the denial of Safeway's cross petition which sought to enjoin the giving of trade stamps on minimum priced goods on the ground that the stamps cut price. Said the court:

> "[W]e conclude that the weight of law, logic and reason clearly and distinctly shows that the practice of giving trading stamps in the usual customary manner does not amount to, nor will it sustain, a charge of price cutting" (R. 645).

SUMMARY OF ARGUMENT

POINT I

The Oklahoma Unfair Sales Act is a proper exercise of the police power. The decision that illegal competition cannot be met by retaliation but only by application for injunctive relief is based on independent and adequate non-Federal grounds. Safeway's imagined dilemma of being unable to meet sales which are both below cost and legal was never presented to nor passed on by the State court.

POINT II

The distinction between trading stamps not in excess of 3% and loss leaders is a practical difference involving no individual discrimination.

I. The Oklahoma Unfair Sales Act Prohibiting Loss Leader Merchandising, Where the Intent Is to Injure Competitors and the Result Is to Divert Trade, Is a Valid Enactment under the Police Power of the State.

The questions presented by Safeway in its attack on the Oklahoma Unfair Sales Act are not novel to State courts. Thirty states have statutes prohibiting sales below cost which are comparable if not equivalent to the instant Act[3]. Their constitutionality has been well tried and sus-

3. Arizona Revised Statutes, 1955, Volume 5, Title 44, Chapter 10, Article 4, Sections 44-1461, 44-1466.

Arkansas Statutes, 1947, Volume 6, Title 70, Chapter 3.

California Laws, 1941, Chapter 526 (California Business and Professions Code, Division 7, Part 2, Chapter 4). Amended California Laws of 1953, Chapters 333-334.

Colorado Revised Statutes, 1953, Volume 3, Chapter 55, Article 2, Sections 55-2-1 to 55-2-17.

Connecticut General Statutes, Revision of 1949, Title 48, Chapter 314, as amended by Public Act No. 544, Acts of 1955.

Hawaii Revised Laws, 1955, Title 24, Chapter 205.

Idaho Code, 1947, Title 48, Chapter 4. Amended by Laws of 1955, Chapter 95, Chapter 234; Laws of 1959, House Bill No. 281.

Kansas General Statutes, 1949, Annotated, Chapter 50, Article 4.

Kentucky Revised Statutes, 1956, Sections 365.030, 365.040, 365.060, 365.070, 365.990.

Louisiana Revised Statutes, 1950, Title 51, Part VIII, Sub-Part E. Amended, Act of 1952, Act 181; Acts of 1956, Act 121.

Maine Revised Statutes, Ninth Revision, 1954, Chapter 184.

Maryland Code, 1951, Annotated, Article 83, Sections 111-115.

Massachusetts General Laws, 1932, Chapter 92, Sections 14E-14K (inserted by Act of 1938, Chapter 410). Amended by Act 1939, Chapter 189; Act 1941, Chapter 494.

Minnesota Statutes, 1953, Chapter 325, Sections 325.01-325.07, 325.48, 325.49, 325.52. Amended, Laws of 1955, Chapter 339, Laws of 1957, Chapter 822.

Montana Revised Code, 1947, Title 51, Chapter 1. Amended Montana Laws, 1949, Chapter 129.

tained[4]. In the few cases where portions of the statutes

(3 Continued)

Nebraska Revised Statutes, 1943, Chapter 59, Article 12. Amended Laws, 1947, Chapter 203.

New Hampshire Revised Statutes, Annotated, 1955, Chapter 358.

New Jersey Laws, 1938, Chapter 394 (New Jersey Revised Statutes, Title 56, Chapter 4).

North Dakota Revised Code, 1943, Chapter 51 0.

Oregon Revised Statutes, Title 50, Chapter 46, Sections 646.020, 646.100 to 646.180, 646.990.

Pennsylvania Laws, 1941, Act. No. 344.

Rhode Island Public Laws, 1939, Chapter 671.

South Carolina, South Carolina Code of Laws, 1952, Title 56, Chapter 2, Article 3.

Tennessee Code Annotated, 1955, Title 69, Chapter 3.

Utah Code, 1953, Title 13, Chapter 5, Amended Senate Bill 92, Laws of 1955.

Virginia Code, 1950, Title 59, Chapter 2; Amended, Acts of Assembly, 1950, Chapter 588.

Washington Revised Code, 1951, Title 19, Chapter 19.88, Sections 19.88.040-19.88.170.

West Virginia Acts of 1939, Chapter 151, West Virginia Code, Sections 4678 (8) (a)-(n).

Wisconsin Statutes, 1955, Title XII, Chapter 100, Section 100.30; Amended Chapter 186, Laws of 1957.

Wyoming Compiled Statutes, 1945, Article 4, Sections 39.406-39.416.

4. *People of the State of California* v. *Gordon*, 105 Cal. 2d 711, 234 P. 2d 287 (1951)

Louisiana Wholesale Distributors Association, Inc. v. *Rosenzweig*, 212 La. 1015, 36 S. 2d 403 (1948)

Fournier v. *Troianello*, 636 Mass. 232, 127 N. E. 2d 167 (1955)

Associated Merchants of Montana et al. v. *Harry L. H. Ormesher and Bernard Blodgett*, 107 Mont. 530, 86 P. 2d 1031 (1939)

McIntyre v. *Borofsky*, 95 N. H. 174, 59 A. 2d 471 (1948)

Rust et al. v. *Griggs*, 172 Tenn. 565, 113 S. W. 2d 733 (1938)

State of Washington v. *Sears*, 4 Wash. 2d 200, 103 P. 2d 337 (1940)

State of Wisconsin v. *Twentieth Century Market*, 236 Wis. 215, 294 N. W. 873 (1940)

State of Wisconsin v. *Ross*, Wis. Sup. Ct., 1950-1951—C. C. H. Trade Cases, Par. 62,860 (1951)

State of Wyoming v. *Langley*, 53 Wyo. 332, 84 P. 2d 767 (1938)

Decisions in other states point to the probable constitutionality of the statutes in those states;

Carroll v. *Schwartz*, 127 Conn. 126, 14 A. 2d 754 (1940).

Moore v. *Northern Kentucky Independent Food Dealers Association et al.*, 286 Ky. 24, 149 S. W. 2d 755 (1941).

were struck down[5], they have usually been amended to cure the defect[6], and their constitutionality, if subsequently re-challenged, sustained[7], as in the case of the very Statute here involved[8].

The statutes are directed against loss leader merchandising, a technique that has long been the subject of regulation. As early as 1902 South Carolina prohibited the use of loss leaders[9].

---

5. *State of Arizona* v. *A. Meyerson et al.*, Sup. Ct. of Ariz., Pima County, 1940-1941, C. C. H. Trade Cases, para. 56,099 (1941).
State of Arizona v. *Walgreen Drug Co.*, 57 Ariz. 308, 113 P. 650 (1941).
Standard Stores v. *Safeway Stores, Inc. et al.*, Colo. Dist. Ct., 1955, C. C. H. Trade Cases, para. 68,153 (1955)
State of Kansas v. *Consumer's Warehouse Market, Inc.*, Kan. Sup. Ct., 329 P. 2d 638 (1958).
Wiley, d. b. a. Fairmount Market v. *Sampson-Ripley Co.*, 151 Me. 400, 120 A. 2d 289 (1956).
Isaac Cohen et al. v. *Frey and Sons, Inc. et al.*, 197 Md. 586, 80 A. 2d 267 (1951).
Great Atlantic and Pacific Tea Co. v. *Ervin*, D. C. Minn., 23 F. Supp. 70 (1938).
State of New Jersey, On Complaint of Lief v. *Packard-Bamberger and Co., Inc.*, 123 N. J. L. 180, 8 A. 2d 291 (1939), affirming N. J. Dist. Ct., 2 A. 2d 599 (1938).
Commonwealth of Pennsylvania v. *B. P. Zasloff*, 338 Pa. 457, 13 A. 2d 67 (1940).

6. Minnesota Statutes of 1953, Chapter 325, as amended by Chapter 339, Laws of 1955 by Chapter 822, Laws of 1957.
Nebraska Revised Statutes, 1943, Chapter 59, Article 12, as amended by Laws of 1947, Chapter 203.
Pennsylvania Laws of 1941, Act No. 344.

7. *McElhone* v. *Geror*, 207 Minn. 580, 292 N. W. 414 (1940).
Hill et al. v. *Kusy*, 150 Neb. 653, 35 N. W. 2d 594 (1949).

8. *Englebrecht* v. *Day*, 201 Okl. 585, 208 P. 2d 538 (1949).
Adwon v. *Oklahoma Retail Grocers Association, Inc.* 204 Okl. 199, 228 P. 2d 376 (1951).

9. South Carolina Civil Code of 1912, §2451 (1902, XXIII, 1057) provided: "If any person, persons, company, partnership, association, or corporation engaged in the manufacture or sale of any article of commerce or consumption from the raw material produced or mined in this State, shall, with the intent or purpose of driving out competitors, sell at less than the cost of manufacture, or give away their manufactured products, for the purpose of driving out competitors or financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation

By now there can be no question that there is a sizeable and widely held body of public opinion favoring the prohibition of loss leadering[10]. This opinion found formulation in Oklahoma in the instant Act as it did in the unfair sales acts of numerous other states referred to above and in the Robinson-Patman Act on the Federal level (U. S. C. 13a *et seq.*). While one may disagree with the wisdom of such legislation, or question its place in the scheme of other legislation fostering competition[11], there is no question that the Oklahoma Legislature is entitled to give expression to such views.

> "It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived [Citing cases]. The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."
>
> *Williams* v. *Mayor*, 289 U. S. 36, 42 (1933).

(9 Continued)
resorting to this method of securing a monopoly in the manufacture, refining and sale of a finished product produced or mined in this State shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade and on conviction shall be subject to the penalties of this Act."

10. "The Statutes have their origin in recurrent attempts of competitors to prevent 'destructive' price competition. • • • Under this theory every fair-dealing enterprise is entitled, and even obliged to sell its product at a price which adequately covers all its costs; any lower price is branded as an unfair 'chiseling' attack on other sellers or as a vicious attempt to fool the public." Lovel, *Sales Below Cost Prohibitions*, 57 Yale L. J. 391, 392-394 (1948).

11. Cf. *Standard Oil Co.* v. *Trade Commission*, 340 U. S. 231, 249 (1951) and the articles cited in n. 15.

"When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

Sproles v. *Binford*, 286 U. S. 374, 388-389 (1932).

Within the boundaries charted in *Nebbia* v. *New York* (291 U. S. 502 [1934]), it seems quite clear that a State may regulate business to the extent of prohibiting certain kinds of trade practices provided only "that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained" (at 525). "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty" (at 539).

Indeed, one need not go as far as *Nebbia* to sustain the constitutionality of unfair sales acts since what is here involved is the prohibition of destructive trade practices, not price control[12].

12. "It should be noted, however, that these statutes do not undertake to fix prices at what the Legislature considers a desirable level. While all industries are subject to the statutory provisions, only those businesses will be affected which are engaged in uneconomic practices, i. e. those selling goods below cost 'for the purpose of injuring competitors and destroying competition.' There would seem to be little reason to conclude that there is a vested right to engage in such socially destructive practices, and that the prohibition of them would be a deprivation of property without due process of law." Note, 86 U. of Pa. L. Rev., 780, 781 (1938).

To move from general principles to the object of attack, it is to be realized that Safeway no longer argues as it did below that it must have the unfettered right to meet competition regardless of the illegality of that competition. Similarly it entirely ignores the basic holding of the State courts that it was procedurally out of step in refusing application for injunctive relief in favor of retaliatory action in the market place that threatened chaos (R. 442, 637).

Instead it shifts its focus to a new, hypothetical specie of competition—that which is below cost, but legal because made with an innocent intent. No such sales were shown at the trial, so neither the trial court nor the Oklahoma Supreme Court ever construed—or were asked to construe—the Statute with respect to Safeway's right to meet such competition.

> "Of course, the argument to sustain the contention is that, if the Statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this Court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the Statute is valid. How the State court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now."
>
> *Yazoo and Mississippi Valley Railroad* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219-220 (1912).

"Where the highest court of the State has refused to deal with applications of a statute not involved

in the case before it, the Supreme Court seems invariably to have followed the holding of the *Yazoo* case."

Hart & Wechsler, *The Federal Courts and the Federal System*, 178.

See also:

Smiley v. *Kansas*, 196 U. S. 447, 454-455 (1905).

Safeway's claim is that under the Act as construed and applied in the injunction the day may come when one of its competitors will sell below cost with innocent intent and Safeway will be caught in the position of being unable to meet such sales in the market place or to have them enjoined through court action. If true, of course, Safeway would be equally free to do the same thing, but, on this projected dilemma Safeway pitches its due process attack. The fact is, however, that one cannot say that Safeway will be unable to meet such sales either by market action or injunction. Safeway never posed any such hypothetical case to the Oklahoma courts. Let Safeway present that issue to the Oklahoma courts and they will lift Safeway from the horns of its imagined dilemma.

Moreover, there is a non-Federal ground "independent of the Federal ground and adequate to support the judgment." *Fox Films Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). Under established rules of Federal jurisdiction [*New York City* v. *Central Savings Bank*, 306 U. S. 661 (1958); *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19 (1936);

Lynch v. *New York ex rel. Pierson*, 293 U. S. 52, 54-55 (1934)], Safeway is without standing to contest the State court's decision that Safeway was properly enjoined because it chose the wrong remedy, that of retaliation rather than injunctive relief. On the question of what Safeway's proper remedy was in the face of illegal competition, the Oklahoma courts were most explicit in holding that Safeway was remitted to application for injunctive relief. Without enforcing such compliance the whole purpose of the Act would be frustrated and chaos would ensue (R. 442).

> "Here the non-Federal ground upon which the Oklahoma court based its decision * * * [was] that under the Oklahoma statutes the petitioner had a plain, adequate and exclusive remedy at law."
>
> *McCoy* v. *Shaw*, 277 U. S. 302, 303 (1928).

This "plain, adequate and exclusive remedy at law" Safeway chose to ignore claiming it was against company policy to sue a competitor (R. 243). Having deliberately and repeatedly ignored the lawful processes available to it and resorted instead to outlawed retaliation, Safeway can scarcely be heard to complain that it was denied due process of law.

A final answer to Safeway's argument is to question how probable it is in this practical world for one to "innocently" loss leader. As the California Supreme Court said in construing the California Unfair Practices Act:

"[W]hen a person causes injury by his acts he should be deemed to intend such consequences unless he can excuse or explain his conduct by facts showing that he had an innocent intent."

People v. *Pay Less Drug Store*, 25 Cal. 2d 108, 114-115, 153 P. 2d 9, 13 (1944).

Many would doubt that there is such a creature as an innocent loss leader saying that the concept is a contradiction in terms. In any case, the facts which Safeway presented to justify its price cutting did not persuade the court that it was innocently loss leadering or that its competitors were. Indeed on the basis of the cross examination of Safeway's principal administrative officer, MR. CHRISTIENSEN, the trial court held and the Oklahoma Supreme Court affirmed that Safeway

"• • • without legal justification wilfully and intentionally reduced its prices in an effort to increase its volume, to the detriment of other grocers" (R. 447).

II. To Distinguish Between Trading Stamps Not In Excess of 3 Per Cent and Loss Leaders Involves No Invidious Discrimination.

The Oklahoma Unfair Sales Act as construed by the Oklahoma Supreme Court prohibits direct price cuts on selected traffic items but does not prohibit the giving of trading stamps across the board so long as the stamps do not exceed 3 per cent in value. In this distinction Safeway claims a denial of the equal protection of the laws.

But the distinction is not invidious, and, therefore, does not violate the Fourteenth Amendment,

Williamson v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955).

(1) Safeway no less than any other merchant in Oklahoma can give a *bona fide* cash discount in cash across the board provided it is not in excess of 3 per cent.

(2) Safeway no less than any other merchant in Oklahoma can issue trading stamps, cash register receipts or other evidence of credit not in excess of 3 per cent on all purchases for cash.

(3) Safeway no more than any other merchant in Oklahoma is prohibited from selectively cutting prices below the statutory minimum and claiming such loss leaders are netted cash discounts.

The distinction drawn is clear[13] and uniform[14]. The distinction is grounded, not only on a careful review of the numerous decisions of other state courts of last resort, but more importantly on a demonstrated difference in market effect. Trading stamps have been on the scene so long that they have become an accepted part of retail trade.

---

13. Safeway finds "customary discount for cash not in excess of 3 per cent" too vague. But surely such an accepted trade practice is no more vague than "shortest practicable route" upheld in *Sproles* v. *Binford, supra*, 286 U. S. 374, 393 (1932) where this Court said: "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. (Citing cases) The use of common experience as a glossary is necessary to meet the practical demands of legislation."

14. Safeway also objects to the fact that the court limited to 3 per cent cash discounts only those parties before the court. It does not indicate how the court could have enjoined those not before it. Moreover, one would suppose that *stare decisis* has not departed from Oklahoma, so that this rule coming as it does from the court of last resort in Oklahoma will have general and uniform application.

Neither the merchant nor the consumer looks upon them as a price cut. While they are something extra like many of the services provided to attract trade—free parking, free delivery, extension of credit, etc.,—they are not considered price cuts[15]. Loss leadering involves advertising for 95c what all the others are selling for $1.00. Trading stamps by contrast are given not in relation to any particular item but on total purchases. Emphasis is not on the price of any given item but on an offering of a general service across the board. Whether the distinction is qualitative or quantitative or both it is quite clear it is a practical distinction within the competence of Oklahoma to decide in regulating local economic practices.

> "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure * * * There is no constitutional requirement that regulation must reach every class to which it might be applied—that the legislature must regulate all or none * * * The question is whether the classification adopted lacks a rational basis."
>
> *Sproles* v. *Binford, supra*, 286 U. S. 374, 388, 396 (1932).

No invidious discrimination was sought and none has resulted.

---

15. See Opinion of the Attorney General of Oklahoma May 8, 1950.

CONCLUSION

Wherefore, it is respectfully submitted that the appeal should be dismissed or the judgment affirmed.

s/ MAC Q. WILLIAMSON
Attorney General of Oklahoma

State of Oklahoma ex rel.
Mac Q. Williamson
Attorney General of Oklahoma
State Capitol Building
Oklahoma City 5, Oklahoma

CERTIFICATE OF SERVICE

I, Mac Q. Williamson, Attorney General of Oklahoma, on the relation of the State of Oklahoma, *amicus curiae* herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of May, 1959, I served copies of the foregoing Motion for Leave to File a Brief as *Amicus Curiae* and Brief of *Amicus Curiae* on the Merits, on the several parties to the within appeal, as follows:

On Oklahoma Retail Grocers Association, Inc., a corporation, and Louie J. Speed, Inc., a corporation, by mailing copies in duly addressed envelopes with proper postage prepaid, to their respective attorneys of record, as follows:

Miskovsky & Miskovsky
Hightower Building
Oklahoma City, Oklahoma

William J. Holloway, Sr.
First National Building
Oklahoma City, Oklahoma

Looney, Watts, Looney & Nichols
First National Building
Oklahoma City, Oklahoma

Samuel M. Lane
26 Broadway
New York, New York

On Safeway Stores, Inc., a corporation, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record as follows:

Embry, Crowe, Tolbert, Boxley & Johnson
570 First National Building
Oklahoma City, Oklahoma

Clark, Reed & Clark
1900 Adolphus Tower
Dallas 2, Texas

Robert L. Clark
1900 Adolphus Tower
Dallas 2, Texas

MAC Q. WILLIAMSON
Attorney General of Oklahoma
State Capitol Building
Oklahoma City 5, Okla.

MAY, 1959.